

1
2 UNITED STATES DISTRICT COURT
3 WESTERN DISTRICT OF WASHINGTON
4 AT TACOMA

5 GWENNETH LOUISE MCCALLISTER,

6 Plaintiff,

7 v.

8 CAROLYN COLVIN, Acting
Commissioner of Social Security,

9 Defendant.

CASE NO. C12-5886 BHS

ORDER GRANTING
PLAINTIFF'S MOTION FOR
EAJA FEES

10 This matter comes before the Court on Plaintiff Gwenneth Louise McCallister's
11 ("McCallister") motion for attorney fees pursuant to the Equal Access to Justice Act
12 ("EAJA"), 28 U.S.C. § 2412(d) (Dkt. 21). The Court has considered the pleadings filed in
13 support of and in opposition to the motion and the remainder of the file and hereby grants
14 the motion for the reasons stated herein.

15 **I. PROCEDURAL & FACTUAL BACKGROUND**

16 On October 16, 2012, McCallister filed a request for judicial review of the
17 Commissioner of Social Security's ("Commissioner") final decision denying her
18 disability benefits. Dkt. 3. On September 6, 2013, Magistrate Judge Karen L. Strombom
19 issued a Report and Recommendations ("R&R"), reversing the ALJ's decision to deny
20 benefits and remanding the matter for further administrative proceedings. Dkt. 18. Judge
21 Strombom found that the ALJ erred in evaluating the opinions of Shane D. Dunaway,
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1 M.D., McCallister's treating physician, which affected the ALJ's assessment of
2 McCallister's residual functional capacity (RFC) and thus her finding of no disability.
3 Dkt. 18 at 6. Specifically, Judge Strombom found:

4 As plaintiff points out, the state agency physical evaluation form Dr.
5 Dunaway completed defines the term "sedentary work" in part as work that
6 "may require sitting, walking and standing for brief periods" (AR 395),
7 while the Commissioner's regulations provide in terms of sedentary work
8 that "[s]itting would generally total about 6 hours" (Social Security Ruling
9 ("SSR") 96-9p, 1996 WL 374185 *3). Defendant is correct that use of the
10 word "may" in the state agency form indicates it is permissive in nature.
11 That is, although sedentary work may require sitting for only brief periods,
such is not necessarily the case. By the same token, however, clearly the
definition of sedentary work employed on the form Dr. Dunaway
completed contemplates the possibility of such a sitting limitation. It is
unclear though whether Dr. Dunaway felt plaintiff could only sit
for brief periods or if he instead felt she could sit for up to six hours at a
time or if he felt she fell somewhere in between.[footnote omitted] *See* AR
395.

12 The ALJ should have addressed this ambiguity in Dr. Dunaway's
13 opinion, as well as the potential conflict with the Commissioner's own
14 definition of sedentary work, before finding Dr. Dunaway believed plaintiff
15 was qualified to do the latter. The ALJ's failure to do so constitutes error on
16 her part. Defendant argues such error is harmless because the vocational
17 expert testified at the hearing that the jobs she identified "would
18 accommodate [a] sit/stand option." [footnote omitted] *See* AR 59. But as
19 noted by plaintiff the vocational expert did not testify as to the frequency of
the shift between sitting and standing accommodated by those jobs, and
thus it is not at all clear that such an option would adequately encompass
the potential need to sit for brief periods only. Given that it is the
Commissioner's burden to establish that plaintiff can perform other work, it
is not reasonable to assume the sit/stand option the vocational expert
testified too necessarily shows plaintiff could perform all of those jobs. *See*
Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir.1999); 20 C.F.R. §
404.1520(d), (e), § 416.920(d), (e).

20 Dkt. 18 at 6-7. Judge Strombom concluded that because issues remained with regard to
21 "the medical opinion evidence in the record concerning the plaintiff's ability to sit – and
22

1 therefore in regard to her residual functional capacity and ability to perform other ... jobs
2 ... remand is appropriate.” *Id.* at 7-8.

3 No objections to the R&R were filed. On October 10, 2013, the Court adopted
4 Judge Strombom’s R&R. Dkt. 19. On October 11, 2013, judgment was entered
5 consistent with the Court’s ruling. Dkt. 20.

6 On October 30, 2013, McCallister filed the instant motion for EAJA fees. Dkt. 21.
7 On November 21, 2013, the Commissioner responded in opposition. Dkt. 23. On
8 November 15, 2013, McCallister filed a reply. Dkt. 24.

9 II. DISCUSSION

10 A. Standard of Review

11 EAJA provides, in relevant part:

12 Except as otherwise specifically provided by statute, a court shall
13 award to a prevailing party other than the United States fees and other
14 expenses, in addition to any costs awarded pursuant to subsection (a)
15 incurred by that party in any civil action (other than cases sounding in tort),
16 including proceedings for judicial review of agency action, brought by or
17 against the United States in any court having jurisdiction of that action,
18 unless the court finds that the position of the United States was
19 substantially justified or that special circumstances make an award unjust.

20 28 U.S.C. § 2412(d)(1)(A).

21 Thus, to be eligible for attorney's fees under EAJA: (1) the claimant must
22 be a “prevailing party”; (2) the government's position must not have been “substantially
justified”; and (3) no “special circumstances” exist that make an award of attorney's fees
unjust. *Commissioner, INS v. Jean*, 496 U.S. 154, 158 (1990). The Commissioner does
not contest that McCallister was the prevailing party in this action, nor does she contend

1 that special circumstances exist, making an award of attorney's fees unjust. The
2 Commissioner does, however, argue that her position was substantially justified.

3 **B. Substantially Justified**

4 To be “substantially justified” under EAJA, the government's position “must have
5 a reasonable basis in law and fact” at each stage of the proceedings. *Corbin v.*
6 *Apfel*, 149 F.3d 1051, 1052 (9th Cir. 1998). The government's position need not be
7 “justified to a high degree,” but the government must be “justified in substance or in the
8 main,” or “to a degree that could satisfy a reasonable person.” *Id.* (citations omitted).
9 Ultimately, the government carries the burden of proving that its litigation position was
10 substantially justified. *See, e.g., Gutierrez v. Barnhart*, 274 F.3d 1255, 1258 (9th Cir.
11 2001). To avoid an EAJA award, the government must show that it was substantially
12 justified “with respect to the issue on which the district court based its remand[.]” *Lewis*
13 *v. Barnhart*, 281 F.3d 1081, 1083 (9th Cir. 2002).

14 **C. Analysis**

15 The Commissioner maintains she was substantially justified in her position. Dkt.
16 23. The Commissioner argues that a reasonable person could think that the ALJ properly
17 accommodated Dr. Dunaway’s opinion that Plaintiff could perform in a job that “may
18 require sitting, walking and standing for brief periods.” Dkt. 23 at 4. The Commissioner
19 bases her argument on the fact that “[i]t is not clear from the comma placement whether
20 walking and standing were for brief periods, or whether sitting, walking, and standing—
21 all three—were only for brief periods.” *Id.* According to the Commissioner:
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1 A reasonable person could interpret the form the first way and think that
2 walking and standing were for brief periods. This interpretation of the form
3 is not at odds with the Commissioner's definition of sedentary, thus, a
reasonable person could think the ALJ accommodated Dr. Dunaway's
opinion.

4 *Id.* The Commissioner maintains that the ALJ's interpretation was also reasonable
5 because it comports with DSHS's own definition of sedentary, which included
6 regulations making it clear that DSHS defines sedentary work to include "[w]alking or
7 standing only for brief periods" in a workday. *Id.* (citing Wash. Admin. Code (WAC) §
8 388- 499-0030 (2012)). The regulations place no limitation on the amount of time spent
9 sitting in a sedentary occupation. *Id.* While the Commissioner acknowledges that it is
10 unlikely Dr. Dunaway was familiar with the WAC, she contends that the WAC provides
11 support for the proposition that the ALJ's interpretation of Dr. Dunaway's assessment
12 was reasonable. *Id.*

13 McCallister maintains that the Commissioner's position was not substantially
14 justified. Dkt. 24. She argues that the Commissioner's position was not reasonable
15 essentially because (1) the ALJ relied on the SSA's definition of sedentary in determining
16 McCallister's residual functional capacity, where Dr. Dunaway, to whose opinion the
17 ALJ gave great weight, provided an opinion based on DSHS's definition of sedentary; (2)
18 the ALJ did not resolve conflicts between the definitions; and (3) as the Court found, the
19 vocational expert's RFC assessment, which assumed a "sedentary RFC" using SSA
20 standards (Dkt. 18 at 7), was not reasonable. *Id.* at 2-4 (citing *Gillman v. Astrue*, 829 F.
21 Supp. 2d 999 (2011) (upon motion for EAJA fees after remand, court found DSHS and
22 SSA definitions of "sedentary" "markedly dissimilar," the ALJ's decision not to address

1 the dissimilarity in definitions was error and vocational expert's testimony regarding
2 ALJ's hypothetical, which was assumed a "sedentary RFC" under SSA standards, did not
3 track the examining doctor's opinion of plaintiff's RFC because it was based on DSHS's
4 definition of sedentary).

5 As Judge Strombom found in her R&R, which the Court adopted, the ALJ erred in
6 her evaluation of Dr. Dunaway's opinion, where the ALJ failed to address the ambiguity
7 and "potential conflict" between the DSHS and SSA definitions of sedentary. *See* Dkts.
8 18 and 19. Additionally, given the ALJ's error in failing to account for the marked
9 dissimilarity in the DSHS and SSA definitions of sedentary, and the ALJ's error in
10 relying on the vocational expert's testimony about the type of jobs McCallister could
11 perform based on the SSA's definition of sedentary when the doctor's assessment was
12 based on DSHS's definition, as well as the ALJ's resulting misassessment of the residual
13 functional capacity assessment and disability, the Commissioner's position was not
14 reasonable. Therefore, her position was not substantially justified.

15 **III. ORDER**

16 Therefore, it is hereby **ORDERED** that McCallister's motion for attorney fees
17 pursuant to EAJA (Dkt. 21) is **GRANTED**.

18 Dated this 30th day of December, 2013.

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21 BENJAMIN H. SETTLE
22 United States District Judge